rule must be made; otherwise domestic privacy would deprive the weaker of the law's protection against the violence of the stronger. *Lord Audley's Case*, 3 How. St. Tr. 402. The principle of this exception seems applicable to the present case, though no actual authorities have been found squarely in point. *Cf. Clarke* v. *State*, 117 Ala. 1. The subjection of an infant of tender years to the power of its parents is even more complete than that of either spouse to the other. Moreover, if the parents cannot testify against one another, such an infant is equally without the protection which the probability of discovery would otherwise afford. This general topic has been very widely affected by statutes. See 1 WIGMORE, EV. § 488.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

DESTRUCTIBILITY OF CONTINGENT REMAINDERS. — The rule was early laid down that devises of contingent future estates which, according to the state of affairs at the testator's death, were capable of taking effect as remainders, would be held to be contingent remainders, and not executory devises. *Carwardine* v. *Carwardine*, 1 Eden 34 (1757). Thus, where a future interest was limited upon a contingency which might happen either before or after the termination of the particular estate, it was held to be a contingent remainder. The result was to bring into operation the principle that a contingent remainder fails absolutely unless it vests during the continuance of the particular estate or at the instant of its termination. Whether the testator's intention is accomplished or defeated by holding the future interest in this class of cases to be a destructible contingent remainder, is the subject of a series of interesting essays in the Law Quarterly Review. *Contingent Future Interests, after a Particular Estate of Freehold*, by Albert Martin Kales, 21 L. Quar. Rev. 118. *Future Interests in Land*, by Edward Jenks, 20 *ibid.* 280; 21 *ibid.* 265.

Mr. Kales lays down two theses: first, the rule requiring future interests to take effect as contingent remainders or fail entirely, is not a rule of construction designed to ascertain the testator's intention, but is, rather, like the rule in Shelley's case, an absolute rule of law often defeating his intention; second, the rule itself has been abrogated without the aid of statute, and destructible contingent remainders no longer exist. He maintains that when a future contingent interest is limited after a particular estate, upon a contingency which may happen either before or after the particular estate ends, the language used, in the absence of any expressions to the contrary, shows an intent that the future interest shall take effect whenever the contingency occurs, regardless of the time of termination of the particular estate. In Festing *v.* Allen, [12 M. & W. 279 (1843)] the limitation was substantially to A for life, and after her death to all her children who should attain twenty-one. In *In re* Lechmere and Lloyd [18 Ch. D. 514 (1881)] the limitation was to A for life, and after her death to such children of A as, either before or after her death, should attain twenty-one. In the former decision, the limitation was held to create a contingent remainder; in the latter, an executory devise. But the intention, the writer argues, is as clearly expressed in the first case as in the second, that the future interest "take effect when the event happens without reference to the termination of the preceding interest." The rule requiring contingent future interests to take effect "by way of succession," *i. e.* as contingent remainders, was established prior to the Statutes of Uses and of Wills, when no other form of contingent future estate was legal. These statutes, however, made it possible for such interests to take effect "by way of interruption," *i. e.* as executory devises; and executory devises were held indestructible. See *Pells* v. *Brown*, Cro. Jac. 590 (1620). Where the contingency upon which the future estate was

dependent occurred after the particular estate ended, the interest could now take effect as an executory devise; but the courts still blindly held to the rule, that if the contingency might possibly occur before or at the termination of the preceding estate, the interest must be held a contingent remainder, and so destructible. Every future interest which has been held a contingent remainder will, however, be found to have been limited upon a contingency which might have occurred either before or after the termination of the particular estate. The logical result of *In re* Lechmere and Lloyd, and the later decisions,[1] holding such an interest not a contingent remainder, is, therefore, that the rule has been abrogated, and there exist to-day practically no contingent remainders, *i. e.*, contingent future interests which must take effect by way of succession.

Mr. Jenks, on the other hand, maintains that the rule discussed above faithfully carries out the testator's intention, and is still law. It is erroneous, says he, to suppose the rule "to imply that the same limitation might conceivably be construed both as a remainder and as an executory interest." Unquestionably the same limitation cannot take effect both as a contingent remainder and as an executory devise. This is, however, no objection to holding that the limitation shall take effect as a contingent remainder if the contingency occurs before the particular estate ends; and as an executory devise if the contingency occurs afterwards. Mr. Jenks contends that the essence of a contingent remainder is that "it was clearly intended to take effect on, and only on, the expiry of the particular estate — in other words, by way of succession." But if the reason why a contingent future interest capable of taking effect as a remainder, shall be construed as a contingent remainder, is because the testator intends it to be a remainder, then the rule is reduced to the empty formula, that the interest shall be construed to be what the testator intended it to be. What does Mr. Jenks mean by the intention that the interest shall take effect "by way of succession," *i. e.* as a remainder? If he means that the testator intends that the beneficiary shall not take if the contingency occurs after the particular estate ends, it is submitted that in fact no such expressed intention can be found in the cases in which the rule has been enforced. Mr. Jenks seems, however, to ascribe to the testator a more artificial intention. The testator is made to conceive of an estate in the abstract, apart from the beneficiaries designated by him, and to intend that it shall take effect, if at all, only at the instant when the particular estate ends. It seems more accurate in fact to say that he intends that after the expiration of the particular estate the beneficiaries described shall take a certain *quantum* of interest if a named contingency happens. If the contingency may obviously occur either before or after the preceding estate ends, and if the law permits the interest to take effect in the former event as a contingent remainder, and in the latter as an executory devise, then, unless such a desire is clearly expressed, it is a fiction to say that he intends the interest to take effect in the former alternative only.

WRITTEN AND UNWRITTEN CONSTITUTIONS IN THE UNITED STATES. — In deciding, in the case of Dorr *v.* United States (195 U. S. 138), that the right of trial by jury does not extend to the Philippine Islands, the Supreme Court of the United States has opened an entirely unsuspected field in American constitutional law, which Judge Emlin McClain has apparently been the first to explore. His able and suggestive essay furnishes the basis for a new chapter in the text-books on the subject. *Written and Unwritten Constitutions in the United States*, by Emlin McClain. 6 Columbia L. Rev. 69 (Feb., 1906).

The case of Dorr *v.* United States reaffirms and applies to the solution of the facts presented therein the principle decided in the Insular Cases, that the provisions of the Fifth and Sixth Amendments to the Federal Constitution guaranteeing common law procedure, including the right of indictment and trial by

[1] Miles *v.* Jarvis, 24 Ch. D. 633 (1883); Dean *v.* Dean, [1891] 3 Ch. 150; Blackman *v.* Fysh, [1892] 3 Ch. 209; Battie-Wrightson *v.* Thomas, [1904] 2 Ch 95.